

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MICHAEL BASSIRPOUR,

Plaintiff/Counter-Defendant,

vs.

Case No. 2014-953-CB

GLE SCRAP METAL, INC.,

Defendant/Counter-Plaintiff.

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OPINION AND ORDER

Plaintiff/Counter-Defendant Michael Bassirpour (“Plaintiff”) has filed a motion for summary disposition pursuant to MCR 2.116(C)(7). Defendant/Counter-Plaintiff GLE Scrap Metal, Inc. (“Defendant”) has filed a response and requests that the motion be denied.

In addition, Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). Plaintiff has filed a response and requests that the motion be denied.

*Factual and Procedural History*

On January 1, 2011, the parties entered into an employment agreement, which contained non-compete and non-solicitation provisions (the “Agreement”). On December 30, 2011, Plaintiff’s employment with Defendant ended.

On March 13, 2014, Plaintiff filed his complaint in this matter asserting claims for: Unpaid Sales Commissions pursuant to MCL 600.2961 (Count I); Breach of Contract (Count II); and Unjust Enrichment (Count III).

On April 18, 2014, Defendant filed its answer and affirmative defenses. On May 2, 2014, Defendant filed its amended answer and affirmative defenses, as well as a counterclaim for breach of the non-compete and non-solicitation provisions of the Agreement.

On May 12, 2014, Plaintiff filed his instant motion for summary disposition and to compel arbitration. Defendant has since filed a response and requests that the motion be denied.

On May 19, 2014, Defendant filed its instant motion for summary disposition. Plaintiff has since filed a response and requests that the motion be denied.

#### *Standard of Review*

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtko v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well

as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

*Arguments and Analysis*

1) Plaintiff's Motion for Summary Disposition and to Compel Arbitration.

In his motion, Plaintiff contends that he improperly filed this matter with this Court as the Agreement requires this matter be submitted to statutory arbitration pursuant to MCL 600.5001.

The Agreement provides in pertinent part:

10. Arbitration. [Defendant] and [Plaintiff] recognize that differences may arise between them during and following [Plaintiff's] employment with [Defendant], and that those differences may or may not be related to such employment. As a material term of employment, [Plaintiff] and [Defendant] agree that any and all claims, controversies, disputes or complaints arising out of or relating to the employment relationship including termination thereof, and specifically including, but not limited to any civil rights claim under state and/or federal law, any employment-related dispute or disagreement shall be resolved by statutory arbitration under MCL 600.5001, as amended, and the applicable court rules, MCR 3.602, as amended.

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[Defendant] and [Plaintiff] agree this arbitration provision does not include claims by [Defendant] for injunctive and/or other equitable relief for any breach of this Agreement including, but not limited to, or violation of the non-solicitation or non-compete provisions in this Agreement, or any other violations of any term of employment, all as to which [Defendant] may seek and obtain injunctive and/or other equitable relief from a court of competent jurisdiction.

While it concedes that Section 10 requires the parties to submit non-equitable/injunctive claims to arbitration, Defendant contends that Plaintiff waived his right to compel arbitration when he filed his claims with this Court. "Waiver of a contractual right to arbitrate is

disfavored.” *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). The party contending that the right to arbitration has been waived “bears a heavy burden of proof and must demonstrate” that there was: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate; (3) and prejudice resulting from the inconsistent acts. *Id.* “A waiver may be express or it may be implied when a party actively participates in a litigation or acts in a manner inconsistent with its right to proceed to arbitration.” *Capital Mortg Corp v Coopers & Lybrand*, 142 Mich App 531, 535; 369 NW2d 922 (1985). Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case. *Madison, supra* at 588.

In this case, Plaintiff did not have knowledge of his right to arbitration until he was served with Defendant’s counterclaim, which included a copy of the Agreement. Shortly after receiving a copy of the Agreement Plaintiff filed his instant motion to compel arbitration. In its response, Defendant contends that Plaintiff waived his right to arbitrate by serving it with his first set of interrogatories and requests for production on the same day that he filed his motion to compel arbitration. Defendant asserts that Plaintiff acted inconsistent with his right to arbitrate by engaging in discovery after he gained knowledge of his right to arbitrate. However, even if the Court were to find that serving two sets of discovery requests was a sufficient basis to find that Plaintiff had waived his right to arbitrate, Defendant is also required to establish that it has been prejudiced by Plaintiff’s inconsistent acts. *Madison, supra* at 588. In this case, Defendant has failed to make any showing that it has been prejudiced by Plaintiff’s actions. Further, it does not appear that Defendant has provided answers to Plaintiff’s discovery requests, which thereby negates any potential prejudice that may have been caused by the discovery requests. Accordingly, the Court is convinced that Defendant has failed to meet its heavy burden of

establishing that Plaintiff waived his right to arbitrate this matter. Consequently, Plaintiff's request to compel arbitration must be granted.

2) Defendant's Motion for Summary Disposition.

For the reasons discussed above, this matter must be submitted to arbitration pursuant to the Agreement. Consequently, this Court does not have jurisdiction over the parties claims and Defendant's motion for summary disposition must be denied on that basis.

*Conclusion*

For the reasons set forth above, Plaintiff/Counter-Defendant Michael Bassirpour's motion for summary disposition and to compel discovery is GRANTED. The parties are hereby ordered to arbitration pursuant to the Agreement.

In addition, Defendant/Counter-Plaintiff GLE Scrap Metal, Inc.'s motion for summary disposition is DENIED.

Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and CLOSES this case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: July 7, 2014

JCF/sr

Cc: *via e-mail only*

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